No. 19,764

IN THE

United States Court of Appeals

For the Ninth Circuit

HERLONG-SIERRA HOMES, INC.,
a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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Appellant's Jurisdictional Statement being correct, and its Statement of the Case being adequate, we will pass immediately to consideration of the four points argued by appellant.

1. The first of these is that the United States was not entitled to enforce appellant's note and deed of trust because the conduct of the United States (detailed in appellant's brief, pages 6-9 and 21-24) had prevented the appellant from performing its contractual duty of making installment payments. One answer to this is that, so far as we can ascertain, there is no case holding that the obligation to pay money can be excused or delayed by reason of the creditor's interference with the debtor's means of

obtaining money. This may be because money, in theory at least, is always available, from an infinite number of sources.

A second answer to the argument is that even if appellant's failure to pay the *full amount* of each installment could be excused, the record shows no excuse for appellant's failure to pay *any* amount after August, 1956.

A third answer to the argument is that it derives essentially from the principle of estoppel, which, where it is based upon improper and unauthorized acts of government agents, cannot be invoked against the government. *Cramer v. U. S.*, 261 U.S. 219; *Utah Power and Light Company v. U. S.*, 243 U.S. 389.

A fourth answer to the argument is that what the Commanding Officer of Sierra Ordnance Depot did and did not do lay well within the scope of his discretion. If his actions and inactions caused appellant to lose tenants for its housing units, this was *damnum absque injuria* to the appellant, both with respect to its offensive position under the Tort Claims Act and with respect to its defensive position in this foreclosure action.

But the fifth and best answer to the argument is that the District Court had found (Findings 9, 10, 11, 12: T.R. Vol. I, pp. 141-142) that the United States and its agents did not cause the appellant's inability to make payments on the promissory note, or do anything to excuse appellant's failure to make such payments as they became due; and these findings are

amply supported by the evidence. Appellant's brief asserts, but does not undertake to demonstrate, that the findings are unsupported by evidence. This entire matter of the government's obligation or lack of obligation toward appellant, with respect to the achievement of tenancy in appellant's housing units, and the propriety or impropriety of the actions of government agents, was fully discussed in the Tort Claim case mentioned by appellant at page 4 of its brief, which case was consolidated with this for trial, viz. *Builders Corporation of America and Herlong-Sierra Homes, Inc. v. United States,* No. 18,315 in this Court, 320 F. 2d 425. Consequently, we request the Court to examine the following portions of our brief in that case and to consider them as part of this brief: Argument, Points 1 and 2, on pages 5-8; and Appendix, Extracts 2 and 3 on pages 23-49 of Appendix.

2. The second point argued by appellant is that the District Court should have made some provision in the judgment for safeguards against an excessively low bid at foreclosure sale. The answer to this is that, while the federal courts may have the power to set aside a foreclosure sale made at an unconscionably low price, all that is before the Court now is the Judgment of Foreclosure and Order of Sale, not the sale itself. The sale may have been made, and presumably was made, at a perfectly equitable price. And the provisions of California law, such as California Code of Civil Procedure Section 726, are immaterial unless the District Court was wrong in holding that federal law, not state law, controls the right to a deficiency judgment.

3. The third point argued by appellant is that the propriety of a deficiency judgment here should be determined by California law; that California law bars a deficiency judgment; and that, if federal law governs, the National Housing Act should be so construed as to bar a deficiency judgment. The answer to this is:

(a) Even if California law were to be applied, it would not bar a deficiency judgment because Section 580(b) of the California Code of Civil Procedure is concerned with mortgages and deeds of trust "given to secure payment of the *balance of the purchase price*" (emphasis added) of property, and not with security for the payment of money loaned for the purpose of *constructing and equipping* buildings on the mortgaged land, as was the case here. (T.R. Vol. I., p. 141, Finding No. 7.) *American National Bank v. Gorham,* 109 P. 2d 65, 153 Kan. 145; *Syracuse Savings and Loan Association v. Hass,* 234 N.Y.S. 514, 517, 134 Misc. 82. See also *Roseleaf Corp. v. Chierighino,* 59 Cal. 2d 35, 378 P. 2d 97; *Heckes v. Sapp,* 229 Cal. App. 2d 549, 40 Cal. Rptr. 485.

(b) We agree with appellant's statement (p. 39, Brief) that "whether the enforcement of a Federal right is to be controlled by State or Federal law is to be determined in the first instance on [the basis of] which law the Congress intended to make applicable." But we disagree with appellant when it says (p. 41, Brief) that "Resort to the specific language of the Title VIII of the National Housing Act indicates a strong intention of the Congress to make State law applicable." The reference to state law in the statu-

tory definition of the term "first mortgage" [National Housing Act, 48 Stat. 1246, 1247; 63 Stat. 570, 571; 69 Stat. 646] has nothing to do with the matter. Nor does the fact that the note contains a provision [T.R. Vol. I, p. 12] that it shall be construed according to the laws of California. There is nothing whatever in the National Housing Act to suggest that Congress intended the normal right to a deficiency judgment upon foreclosure to be subject to destruction in some states, and not in other states, depending upon the law of the particular state involved. If there were nothing of an affirmative character showing that Congress *did* intend F.H.A. to have the right to a deficiency judgment, the decision of this Court in *U. S. v. View Crest Garden Apts., Inc.,* 268 F. 2d 380, cert. den. 361 U.S. 884, would be decisive. *View Crest* held that F.H.A.'s entitlement to a receiver in a foreclosure case is to be determined according to federal, rather than state, law. There is no less reason, and perhaps more reason, for F.H.A.'s entitlement to a deficiency judgment to be determined according to a uniform, federal rule.

(c) But the National Housing Act is not devoid of an expression of Congressional intent on the point. Section 204(a) of the original Act [48 Stat. 1249] says that where the mortgagor has acquired possession of the mortgaged property through foreclosure or otherwise, he shall be entitled to receive the benefits of the insurance provided for by the Act "upon the prompt conveyance to the Administrator of title to such property satisfactory to him and the assignment to him of all claims of the mortgagee against the